

August 7, 2006

Civil Division-Kent County (739-7641)

Mr. Mark G. Schaeffer
545 Kates Way
Smyrna, DE 19977

**Re: Freedom of Information Act Complaint
Against Town of Smyrna**

Dear Mr. Schaeffer:

Our Office received your Freedom of Information Act ("FOIA") complaint on June 15, 2006. You allege that four members (a quorum) of the Smyrna Town Council ("the Town") violated FOIA by meeting privately on or about May 25, 2006 to discuss a matter of public business (legal counsel and costs). You allege that as a result of that private meeting, the four Council members "directed the [Town] manager to order the Town Solicitor, John Terence Jaywork, to turn over all 'emails, phone messages or other documents' regarding [your] concerns that an illegal meeting was held on May 18, 2006, in which the appointments of a Vice Mayor and members of committees were illegally made."

You attached to your complaint an e-mail dated May 25, 2006 from Dave Hugg, the Town Manager, to the Town Solicitor:

[A]s we discussed by phone, I have now been contacted
by 4 Council members who expressed concerns about

the number of emails and amount of legal work you have conducted since the Special Meeting on May 18. In particular they feel that much of the work was driven by complaints from Mayor Schaeffer resulting in additional, and perhaps unnecessary or premature legal costs. They have asked me to advise you to not continue to research or do other legal work on any of the issues arising from that meeting pending a full discussion by the Council. They have also asked that all members of Council be provided all emails, phone messages or other documents between you and Mayor Schaeffer on this matter in order to better understand why the work was carried out and at whose direction.

By letter dated June 12, 2006, we asked the Town to respond to your complaint by June 23, 2006. We granted the Town's request for a brief extension of time and received the Town's response on July 6, 2006.

According to the Town, the four Council members (Patrick Cahill, Douglas Chervenak, Gene Mullen, and Valerie White) "did not discuss the matter [legal counsel and costs] with other members of the Council before contacting the Town Manager." The Town provided us with sworn affidavits from the four Council members and the Town Manager to show "that each of the four members of Council acted independently in contacting the Town Manager. It is not a violation of FOIA's open meeting rule for members of a public body to contact the administrator of the body independently and ask similar questions and request similar information." The Town further contends that "some discussion between one member of Council and another regarding the events leading to the Town Manager's May 25, 2006 email would not be a violation of FOIA, and based on the affidavits, there was clearly no attempt by the four members of Council to circumvent FOIA notice requirements."

The Mullen affidavit states that he does "not recall discussing my concerns with other

Mr. Mark G. Schaeffer
August 7, 2006
Page 3

members of Council other than Pat Cahill before contacting the Town Manager” The Cahill affidavit states that he “discussed my concerns with Councilmember Mullen at some point in time after I spoke to the Town Manager” but he does “not recall speaking or discussing this issue with Councilmember Chervenak.” The Chervenak affidavit states that he “may have discussed my concerns with Councilman Cahill and possibly Councilman Mullen before contacting the Town Manager about the e-mails from the Town Solicitor. Any discussion that may have taken place would have been on a one-to-one basis.” The White affidavit states that she “did not discuss my concerns with other members of Council before contacting the Town Manager”

RELEVANT STATUTES

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except” for a purpose authorized by statute for executive session. 29 *Del. C.* §10004(a).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” *Id.* §10002(e).

LEGAL ANALYSIS

Over the last several years, our Office has wrestled with the issue whether serial discussions between members of a public body amount to a “meeting” subject to the requirements of FOIA. There is only one Delaware case addressing the issue.

In *Tryon v. Brandywine School District Board of Education*, C.A. No. 11161, 1990 WL 51719 (Del. Ch., Apr. 20, 1990) (Hartnett, V.C.), the president of the school board (Dr. Graham) telephoned individual board members during the week before a public meeting where the board was to vote on a student assignment plan. “In a few cases, Dr. Graham asked how the particular Board member was inclined to vote, but there is no evidence that Dr. Graham attempted to convince any Board member to vote in any particular manner.” 1990 WL 51719, at p.1.

The Chancery Court held that FOIA did not apply to these serial discussions. “The separate telephone calls made by Dr. Graham to fellow individual members of the Board prior to the September 25, 1989 meeting involved only himself and one other person, consequently, such conversations would not constitute a ‘meeting’ under [FOIA] because a ‘quorum’ of the Board was not involved in any of the conversations.” 1990 WL 51719, at p.3. “The Delaware Freedom of Information Act therefore cannot, as a matter of law, apply to those conversations.” *Id.*

Like Delaware’s FOIA, “[m]ost Freedom of Information Acts or Sunshine Acts . . . generally do not apply to conversations between less than a quorum.” *Tryon*, 1990 WL 51719, at p.3 (citing *Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983)). The courts in other states, however, have held that a public body may achieve a constructive quorum through serial discussions.

In *Moberg*, “[d]uring the time the Board was engaged in the process of determining which school to close, individual Board members gathered in private on at least seventeen occasions and discussed the school closing issue. In addition to these face-to-face meetings, all of the Board members had numerous telephone conversations with other Board members concerning the school closing.” 336 N.W.2d at 514.

The Minnesota Supreme Court held that only conversations involving a quorum of the Board violated the state open meeting law. The court expressed concern that “this rule may be circumvented by serial face-to-face or telephone conversations between board members to marshal their votes on an issue before it is initially raised at a public hearing” but it “does not follow that two- or three-person conversations should be prohibited.” *Id.* at 518.

There is a way to illegally circumvent any rule the court might fashion, and therefore it is important that the rule not be so restrictive as to lose the public benefit of personal discussion between public officials while gaining little assurance of openness. Of course, serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.

336 N.W.2d at 518.

In *Tryon*, the Chancery Court also left open the possibility that serial discussions in groups of less than a quorum might violate FOIA if they were “a means of circumventing the Freedom of Information Act.” 1990 WL 51719, at p.3. There was no evidence in the record in *Tryon* that the Superintendent deliberately tried to avoid FOIA by making “a series of calls or call[ing] repeated meetings to try to sway the Board members’ votes, as occurred in *Blackford v. School Board of*

Orange County, 375 So.2d 578 (Fla. App. 1979).” 1990 WL 51719, at p.3.

In *Blackford*, the District Court of Appeal of Florida held that discussions between individual school board members and the superintendent about redistricting violated the Florida Sunshine Act. Prior case law suggested that a conversation between the superintendent “and a single board member would not be a meeting.” 375 So.2d at 579. “The problem in the case now before us is that this superintendent did much more and devised a plan by which his board members would come visit his office in rapid-fire succession to discuss, exclusively, this major redistricting problem . . . the first at 8:30 a.m., the second at 10:30 a.m. and the third at 12:30 p.m. Two days later three more members did the same.” *Id.* at 580. Based on that record, the court was “convinced that the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken.” *Id.*

Our Office has previously determined that FOIA applies to serial discussions which allow members of a public body “to receive and comment on other members’ opinions and thoughts, and reach a consensus on action to take.” *Att’y Gen. Op.* 03-IB11 (May 19, 2003) (exchange of e-mails between the three members of a nominating committee over a two-day period). There must be “an active exchange of information and opinions” as opposed to “the mere passive receipt of information.” *Id.* It is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum.

In *Att’y Gen. Op.* 04-IB10 (Oct. 18, 2004), a member of the county council drafted a memorandum proposing to allocate \$15 million to the City of Wilmington for law enforcement and then circulated a copy of the proposal to the other six members of the council. Four members of the

Mr. Mark G. Schaeffer
August 7, 2006
Page 7

council signed the proposal, which stated it “represents a consensus” based on telephone conversations among members of the council. Our Office determined “that those serial telephone calls amounted to a meeting of a quorum of the Council in violation of [FOIA].”

In *Att’y Gen. Op. 05-IB03* (Feb. 3, 2005), a member of the town council drafted a letter critical of another member of the council and circulated it to three members of the five-member council, following up with telephone or face-to-face conversations to see if they agreed with her position. Our Office determined that “[t]hese contacts were more than the passive receipt of information” and “the sum of these communications amounted to a meeting of a public body covered by FOIA.”

The Town has seven Council seats and four members constitutes a quorum. The record is uncontroverted that Valerie White was not involved in any conversations with other Council members about legal counsel and costs prior to her calling the Town Manager on May 22, 2006 to express her concerns.

Although there are some ambiguities and inconsistencies in their affidavits, it appears that sometime between May 22-25, 2006 there were at least three one-to-one conversations between Council members about legal counsel and costs: Mullen/Cahill; Mullen/Chervenak; and Chevernak/Cahill. The Town Manager’s affidavit confirms that those three Council members contacted him “separately” by “telephone, email, or in person . . . regarding email communications addressed from the Town Solicitor to me that I had forwarded to all members of the Town Council. I do not recall in which manner each member made contact with me but I am certain that there was no joint contact to me.”

All of our previous opinions which found serial discussions to have violated FOIA had one

factor in common. In each case the discussions involved enough members of the public body that would have constituted a quorum had the discussions all occurred at the same time and place. *See Att’y Gen. Op.* 03-IB11 (all three members of a nominating committee); *Att’y Gen. Op.* 04-IB10 (four members of the seven-member county council); *Att’y Gen. Op.* 05-IB03 (four members of a five-member town council). We determined that the serial discussions amounted to a constructive quorum of the public body when there was an interactive exchange of thoughts and opinions and members were asked to vote or adopt a particular point of view or reach a consensus on what action to take.

In this case, the record shows that at most three members of the seven-member Town Council may have had serial discussions with each other prior to asking the Town Manager to instruct the Town Solicitor not to continue any research regarding the legality of a May 18, 2006 special meeting. Even if those three Council members had physically gathered at the same time in one place, they still would not have amounted to a quorum so the open meeting requirements of FOIA did not apply to their discussions. “The statutory requirement of a quorum ‘represents a legislative attempt, based on public policy reasons, to limit the reach of the open meeting law.’” *Tryon*, 1990 WL 51719, at p.3 (quoting *Delaware Solid Waste Authority v. The News-Journal Co.*, 480 A.2d 628, 634-35 (Del. 1984)).¹

CONCLUSION

¹ We note that FOIA defines a “public body” to include any “committee,” “subcommittee,” or “ad hoc committee” which is “established” or “appointed “ by a public body. 29 *Del. C.* §10002(a). If a seven-member public body “appoints a committee of three members, then a meeting of a quorum (two members) of the committee is a public body subject to FOIA.” *Att’y Gen. Op.* 06-IB03 (Jan. 23, 2006). There is no evidence in the record to suggest that the Town Council established or appointed Councilmen Chervenak, Cahill, and Mullen as a committee of the Council for the purpose of reviewing costs of legal counsel.

Mr. Mark G. Schaeffer
August 7, 2006
Page 9

For the foregoing reasons, we determine that the four members of the Town Council did not violate FOIA by meeting in private as a quorum of the Council to discuss a matter of public business (legal counsel and costs). There were several one-on-one discussions between three members of the Council between May 22-25, 2006, but those serial discussions did not involve a quorum of the seven-member Council so as to trigger the potential application of the open meeting laws.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Lawrence W. Lewis, Esquire
State Solicitor

Mr. Mark G. Schaeffer
August 7, 2006
Page 10

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

John Terence Jaywork, Esquire
Town Solicitor

Phillip G. Johnson
Opinion Coordinator